S.B. CIVIL SECOND APPEAL NO.172/2004

Rajendra Kumar vs. Nanak Chand and others.

Date : 22.7.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. KC Samdariya, for the appellant.

Mr. RR Nagori, for the respondents.

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Heard learned counsel for the parties.

Precisely, the point raised before this Court by the appellant/tenant is that the two courts below failed to notice that the plaintiff failed in proving the issue no.3 framed by the trial court.

According to learned counsel for the appellant, two courts below failed to even record any finding that the appellant/tenant did not tender the amount of rent to the plaintiff/landlord and has not paid the rent of the premises for six months before plaintiff filed the suit.

According to learned counsel for the appellant, in view of the judgment of this Court delivered in the case of Phool Chand & Anr. vs. Dr. Gulab Chand reported in 1999 DNJ (Raj.) 771, in absence of pleadings about failure of the tenant to tender rent, no cause of action accrues to the landlord to file suit for eviction against the tenant on the ground of default in payment of rent. It is also

submitted that both the courts below merely on the fact that the defence of the defendant was struck off which was upheld upto the High Court, the tenant is defaulter and liable for eviction from the premises in question.

According to learned counsel for the appellant, in fact, the plaintiff filed the suit for eviction on the ground of default alleging that the defendant failed to pay the rent from the month of January, 1976 till the month of September, 1976 whereas in fact, the tenant remitted the rent of the premises by money order but the landlord did not accept the rent and, therefore, since the tenant not only offered but in fact, he actually tendered the rent to the landlord, therefore, he cannot be said to be defaulter for that period.

Learned counsel for the appellant further vehemently submitted that the money orders receipt which should have been placed before the trial court but were not produced because of the fault of the advocate as the original money order coupon and receipts were given to the advocate by the appellant/tenant and the appellant came to know about this fact only at the time of filing of second appeal and since the documents are relevant and having material bearing for just and legal decision of the suit, therefore, the appellant submitted application under Order 41 Rule 27 CPC and produced the original money order coupon and receipts along with application. It is submitted that in view of the judgments of the Hon'ble Supreme Court in the cases of (1)

Wadi vs. Amilal and others reported in 2002 WLC (SC) Civil 726 and (2) Adil Jamshed Frenchman (D) by Lrs. vs. Sardar Dastur School Trust & ors. reported in JT 2005(2) SC 332, the documents which have been filed by the appellant may be taken on record and he may be permitted to produce the evidence. It is submitted that when the documents are relevant and trustworthy, then it is always held that those documents should not be allowed.

I have considered the submissions of learned counsel appearing for the appellant.

The present suit was filed by the plaintiff for eviction of his tenant in the year 1976 on the ground of default in payment of rent and on the ground of personal bonafide necessity of the plaintiff. The plaintiff in his plaint clearly pleaded that the rent for the period from January, 1976 till the filing of the suit has not been paid by the tenant. The defendant submitted in his written statement that the defendant offered the rent to the landlord but he refused to accept and, therefore, he sent rent by money order for the period from 1.1.1976 to 31.8.1976 but that rent was not accepted by the landlord and he refused to accept the money order. The trial court determined the rent and directed the tenant to pay the determined rent so that the tenant may take the benefit of first default in payment of rent and may avoid decree for eviction. However, the tenant failed to comply with the provisions of Section 13(4) and, therefore, the tenant's

defence was struck off by the trial court. The tenant challenged the order of striking of defence by filing appeal and thereafter revision before this Court which was dismissed by this Court and the order of striking of defence has become final. Despite the fact that the defence of the tenant has been struck off. Now the defendant in the second appeal wants to challenge the finding of default.

Learned counsel for the appellant relies upon a judgment of this Court delivered in the case of B.B. Bhalla vs. Rameshwar Kishore Badhwar reported in 2001(2) WLC (Raj.) 490 wherein it has been held that merely because of the defence being struck off, the plaintiff is not absolved from proving default and in that case, a decree for eviction passed against the tenant was set aside by this Court in second appeal.

In the present case, the two courts below considered the pleadings of the parties and held that it is not a case of lack of pleading in view of the fact that the plaintiff pleaded that the rent of more than six months have not been paid to the plaintiff and even in rejoinder filed with the leave of the Court, the plaintiff also refuted the allegation of defendant that the rent was tendered to the plaintiff/landlord. Be it as it may be, the fact remains is that the appellant wants to contest the issue of default despite the fact that his defence has been struck off. The appellant lost his right to take a defence that in fact, he paid or tendered the rent to the landlord. By taking plea

of tender of rent by tenant to landlord or by proving that the defendant in fact has paid the rent to the landlord, he only proves his defence. If the defendant, whose defence has been struck of by the order of the court, is allowed to prove tender of rent or payment of rent to the landlord, than it will make the Section 13(5) nugatory and superfluous provision of law. When defence against default of tenant is struck off, it strikes of all defences by which the tenant can plead and prove that he has not committed default in payment of rent for the rented premises.

It is not a case where according to the appellant, the plaintiff's suit was filed without there being ground of default in the plaint. It is not the case of the defendant/tenant that there is no evidence on the record of the plaintiff to prove his case of default by tenant. The case of the defendant is that if his plea (defence) is accepted, he is not defaulter. The case of the appellant is in the form of defence only as the defendant submitted that he tendered the rent to the landlord.

In view of the above reasons, the judgment relied upon by learned counsel for the appellant delivered in the case of B.B. Bhalla (supra) cannot help the appellant. It will be worthwhile to mention here that in the case of B.B. Bhalla (supra), the trial court put the burden upon the tenant to prove that he has not committed any default and that was found by this High Court to be case of placing

wrong burden as it was the plaintiff to first discharge his burden of proving the default of six months against the tenant. Not only this, but in B.B. Bhalla's case (supra), neither the plaintiff appeared in the witness box nor he produced a single witness to prove the initial default and, therefore, that was a case of no evidence for proving the default of tenant prior to the filing of suit. As stated above, here in this case, the plaintiff appeared and gave his statement on oath that the tenant did not pay the rent for more than six months to the plaintiff landlord. Therefore, on facts also, B.B. Bhalla's case (supra) has no application.

It is settled law that once the defence of tenant is strike off against the default, then he cannot put forward any of the defence against the allegation of default. The money order receipt sought to be produced by the tenant in second appeal after 29 years of filing of the suit is only an evidence in defence to the issue for which the defendant's defence has already been struck off upto High Court. Simply because of this reason alone, the document sought to be produced by the defendant tenant cannot be allowed to be taken on record in evidence. Apart from it, in fact, there is no explanation for not filing those documents before the trial court and in fact, in view of the stand taken by the appellant, it is prove that the appellant tenant deliberately did not produce those documents. It is very easy to level allegations against any advocate to take benefit of sympathy of the Court and this

Court fails to understand how the legal representative of the original tenant could have stated on oath that the documents were given to the advocate and he did not produce the documents before the trial court. It appears that the litigants want to say that they were knowing more about the technicalities of law and procedure law and, therefore, they gave the documents to their advocate but the advocate was either not knowing the importance of the documents or was so negligent that he did not produce the very material documents before the trial court. It appears from the contention raised by the appellant in their application under Order 41 Rule 27 CPC itself that the ground is concocted one only.

In view of the above, there is no reason to permit additional evidence at the second appellate stage because of the simple reason that the suit was filed by the landlord in the year 1976 and still he is struggling for possession of the rented premises.

In view of the above reasons, the judgments relied upon by the learned counsel for the appellant only on the scope of Order 41 Rule 27 CPC have not application.

In view of the above discussion, there appears to be even no question of law much less substantial question of law involved in this appeal. Accordingly, this appeal, having no merit, is hereby dismissed.

At this stage, learned counsel for the appellant prayed that he may be given some time to evict the suit property.

Since the appellants are in old possession of the commercial premises and learned counsel for the appellant submits that the appellant will need some time to shift his business and will have to wind up from this shop, therefore, it will be just and proper to permit the appellant to occupy the premises for some time more.

Therefore, it is ordered that in case, the appellant furnishes a written undertaking before the trial court within a period of one month that he shall hand over the vacant possession to the landlord by or before 31.12.2005 and shall pay all the arrears of rent and decreetal amount, if due, within a period of one month from today and shall not part with possession of the property and shall not sublet the property, the decree under challenge shall not be executed till 1.1.2006. The appellant shall also deposit the rent month by month by 15th day of each succeeding month of his tenancy in the trial court. In case of non-compliance of the order or default in payment of rent mentioned above, the decree shall become executable forthwith.

(PRAKASH TATIA), J.

S.Phophaliya